Supreme Court of the United States

OCTOBER TERM, 1940

No. 678

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

FREDERICK S. KEPNER

REPLY BRIEF OF PETITIONER

MORRISON R. WAITE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner

THE LAWYERS & BRIEF CO., LAW PRINTERS
CINCINNATI, OHIO

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In relying on the case of *C. & O. Ry. Co.* v. *Vigor*, 302 U. S. 705, 82 L. Ed. 545, 58 S. C. R. 25, in which this court denied petition for certiorari to the United States Circuit Court of Appeals (6th Cir.) to sustain respondent's contention that this court has decided the matters involved in the instant case, respondent ignores the definite finding of the Sixth Circuit Court of Appeals that there were insufficient facts proven to warrant the granting of equitable relief. At page 8 the court said:

> "We find no fact alleged in the bill or set forth in the supporting affidavits that would justify us in saying

> that the trial of the cause in the Indiana court would cast an unreasonable burden on the plaintiff or would give to the defendant an inequitable advantage."

The denial of certiorari is not a decision on the points of law involved and since the lower court held that there were insufficient facts, this court can be presumed to have held that it would not weigh the evidence. No further presumption is warranted. In the instant case the Supreme Court of Ohio specifically held that the facts warranted the granting of equitable relief under the law of Ohio, but held that the Federal Employers' Liability Act, 45 U. S. C. 56, 36 Stat. 291, barred the courts of Ohio from granting that equitable relief which they would otherwise have granted.

Thus the question stated on pages 21 and 22 of petitioner's brief is squarely raised for a decision by this court. We submit that this court has never decided the exact point, as to whether or not Sec. 6 of the Federal Employers' Liability Act, without expressly prohibiting does prohibit state courts from exercising inherent equitable powers to prevent citizens under such state court's jurisdiction from bringing suits in foreign jurisdictions which would inequitably harass and vex the employer and which would be contrary to the best interests of justice. Respondent does not and cannot point out any express prohibition against such inherent equitable powers and by broad sweeping statements of general propositions of law, attempts to show that such prohibition is contained in the Act by implication.

Respondent cites many cases wherein was presented and decided only the question of the jurisdiction of the court to determine a case brought pursuant to a federal statute. That is a different question from that now presented to the court, which relates not to the jurisdiction of the District Court of the United States for the Eastern District of New York, but to the power in a state court to prevent by

injunction an unjust harassment of a defendant by a plaintiff a citizen of the jurisdiction of the court. The injunction would not interfere with the right granted by said Section 6 to bring his action in the district where the defendant was doing business. It would only confine him to the district or districts in which the defendant was doing business and in which the cause could be tried without unjust harassment. It is important that Congress did not use the words "any district." By avoiding such use it left unhampered the well known equitable jurisdiction over the plaintiff to prevent inequitable choice of a place of trial.

It is apparent from the many cases cited in both petitioner's and respondent's briefs that these questions have troubled the courts considerably, and petitioner submits that this question should be finally determined by this court so that the employee may not now do what the law prior to the amendment of Section 6 permitted the employer to do, to-wit, harass and vex the employee by requiring him to go great distances far removed from the scene of the accident and the residence of all of the witnesses to try his case, if he wished to resort to a Federal Court.

Petitioner cited *Bryant* v. *Atlantic Coast Line Ry. Co.*, 92 F. (2d) 569 (C. C. A. 2) for the proposition that the Second Circuit had ruled that the state court had equitable jurisdiction over its citizens to prevent harassment, notwithstanding the provisions of Section 6 of the Federal Employers' Liability Act.

Our attention has just been called to a decision by the 8th Circuit Court of Appeals in the case of *Southern Railway Company, appellant*, v. *Ethel Painter, Admx.-appellee*, decided January 10, 1941, in which that court considered an identical situation to that raised in the Bryant case, discussed the Bryant case and held directly contrary to the Bryant case, sustaining an injunction against the railroad granted by the District Court in which the action was filed

by the employee and which enjoined the railroad from further proceeding with an injunction granted in its suit against the employer by a state court in Tennessee.

We are advised that counsel for the Southern Railway will have their petition for certiorari and brief filed in this court sometime next week. We mention this to show that litigation on this point continues and will continue until the matter is finally disposed of by this court.

It seems unnecessary for us to answer the next to the last paragraph of respondent's brief (p. 23) in which counsel charge petitioner with causing all the harassment and vexation in this case, particularly in view of the definite holding by the Supreme Court of Ohio that the equities favor petitioner's position, but that the Supreme Court of Ohio is barred from giving relief because of the statute. If that court had denied the equities to be in the petitioner as did the Sixth Circuit Court of Appeals in the Vigor case, supra, then respondent might have had a complaint. We submit that the record shows no mere effort on the part of petitioner to cause delay, but a sincere effort to establish a principle that should be established and which is necessary to prevent the inequitable conduct of this respondent and other plaintiffs. Petitioner's efforts were occasioned solely by the inequitable action of respondent and his counsel in selecting the jurisdiction farthest removed from respondent's residence and the location of the witnesses that could be selected wherein the petitioner was doing business. The respondent cannot obscure his inequity by attempting to throw the blame on his victim who endeavors as best it knows how to escape the wholly unjust consequences of respondent's conduct.

Even since the filing of the petition and the supporting brief herein the pressure on the transportation facilities of the railroads has measurably increased. The necessity of conserving man power for duties essential to the defense

program makes it increasingly important that the time and energies of the employees of the railroads of this country be not needlessly expended in attending the trial of cases many hundreds of miles distant from the place of their duties. A decision by this court of this petition favorable to the petitioner would be in the interest of the national economy, and, we submit, in harmony with the Act of Congress, as well as in harmony with the views of this court at the time of a prior emergency in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 315, where Mr. Justice Brandeis said:

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of employees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

We therefore respectfully submit that the petition for certiorari should be granted.

Morison R. Waite,
William A. Eggers,
Philip J. Schneider,
Counsel for Petitioner.

January 30, 1941.